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No. 1126

UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

No.6944

VELMA S. PALMER
Apartado 75
LA LINEA
(Cádiz) SPAIN

VELMA S. PALMER
Plaintiff, Appellant

v.

ARTHUR E. NISSEN
Defendant, Appellee

UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

No.6944

VELMA S. PALMER
Plaintiff, Appellant

v.

ARTHUR E. NISSEN
Defendant, Appellee

The Appellant, Velma Spencer Palmer, hereby petitions the United States Supreme Court for a writ of Certiorari from the opinion and order of the First Circuit Court of Appeals dated September 25th, 1967 which affirmed the denial for additional costs by the Federal District Court in Case No.6944.

PER CURIAM: Without reaching the question of the extent to which a party, whether a member of the bar or otherwise, is liable for counsel fees incurred in successfully prosecuting a suit against him for damages, we hold, at a minimum, that Plaintiff was correct in assuming in the District Court that she must establish that the defense of the suit was maintained in bad faith, vexatiously or wantonly. The Court found against her on that issue. On this appeal the burden is on her to show that the Court was necessarily wrong and unjustified, and that the evidence compelled a conclusion favourable to her. This is a heavy burden. We find she has not met it. The case accordingly, stands under the general rule that each party, so far as counsel fees are concerned, bears his own.

Affirmed.

In this Brief, page references to Appellant's Record Appendix will be R. and to Appellant's Brief will be RB. and to Appellant's Reply Brief will be RRB.

The facts and evidence in Appellant's Brief and Reply Brief with Appendix compel the conclusion that the Attorney Defendant under 6 Moore Federal Practice Paragraph 54.77 (2) at 1352 did maintain unfounded defences, vexatiously, wantonly, and in bad faith, and that the District Court was wrong and unjustified in denying the Plaintiff's claim for additional costs. The facts and evidence in the Appellant's Brief and Reply Brief with Appendix compel the conclusion that the Federal District Court did not accord the Appellant equitable treatment, or equitable discretion, and the unethical and inequitable treatment accorded the Appellant by the Court compels the conclusion that the Federal District Court was unable to use equitable discretion in the decision on costs to the detriment of the Plaintiff. Therefore the First Circuit Court of Appeals was wrong and unjustified to affirm the decision of the Federal District Court.

It is conceded that the Brief and Reply Brief submitted by Appellant may not be in the language and order of the legal profession but the facts and evidence are all there and compel a conclusion favourable to the Appellant.

The facts and evidence compel the conclusion that the Attorney Defendant did make groundless denials, tortured constructions, maintained unfounded defences, in a vexatious, wanton and oppresive manner and in bad faith, arguing back of his work and assurance as an Attorney and professional man with no moral or legal grounds, ignoring and denying the opinion and order of the Court, making statements contrary

to fact, inconsistant statements, and took advantage of his position as an Attorney all to the detriment of the Plaintiff, and making the amount of effort the Plaintiff had to go to to secure relief unreasonable and put them to the expense of an extended damage suit. All of these facts and evidence are set forth in Appellant's Brief 1 thru 32 and Appellant's Reply Brief 1 thru 8 and it is a fact that the Attorney Defendant did act in a manner as stated above therefore the Court was necessarily wrong and unjustified in denying the Plaintiffs additional costs.

The facts and evidence compel the conclusion that the Court did allow the Defendant Attorney to act in a manner, as was done in this case, (RB 1 thru 32)(RRB 1 thru 8) and that an indictment by the Federal District Court under 6 Moore Federal Practice Paragraph 54.77 (2) at 1352 of the Defendant Attorney's conduct in this case would necessarily be an indictment of the Federal District Court itself. It must be conceded that when the Federal District Court allowed the Attorney Defendant to act in a manner as was done in this case it was wrong and unjustified, and the evidence compels the conclusion that the Court showed prejudice on behalf of its brother with unethical and inequitable treatment to the detriment of the Plaintiff throughout the entire case (RRB 1 thru 8).

The facts and evidence compel the conclusion that the errors in judgment and mis-statements of facts in analysis and factual findings by the Federal District Court did not warrant denial of the claim of Plaintiffs for additional costs and the Federal District Court was wrong and unjustified (RRB 1 thru 8).

(1) The Federal District Court was wrong and unjustified in allowing the Attorney Defendant to sit in on the February 17th pre-trial conference held to determine the issues upon which his liability would be tried, to the exclusion of the Plaintiff (RRB 5, 6)(RB 28).

(2) The Federal District Court was wrong to point out to our only Attorney witness on title in the liability trial how he could refuse to testify as an expert (R 31) and the Court also showed prejudice when it stated that it wished it were not sitting on the case (R 32). The Plaintiffs lost the issue on title and were burdened with the costs of clearing the title. The opinion and order of the Court stated (R 52) "Plaintiffs offered no evidence in support of their contention --" and under footnote 8 (R 52) it stated, "The only witness called by Plaintiffs -- was unable to express an opinion --."

(3) The Federal District Court was wrong to allow the Plaintiffs' Attorney to withdraw leaving Plaintiffs without counsel halfway through and in an inequitable position to conclude the litigation (R 64, 65)(RB 6)(RRB 6 (3)). It is a fact that the chances were substantial that when the Plaintiffs were left without counsel in the damage part of the action and with an unpublished decision in the liability trial there would be a forced settlement out of Court (RB 6, 7, 8).

(4) The Court was wrong in the damage trial over objection of Plaintiffs counsel to allow the Attorney Defendant to argue back of his work and assurance given as an Attorney and professional man (RB 18) in the face of the opinion and order which,

by its finding, established that the 3.7 acre parcel was included in the purchase and sale agreement thereby determining the status knowledge of the parties at the time of signing the agreement December 2nd, 1958 (R 64)(RB 6) and in the face of the Defendant's title certificate of January 12th, 1959 and curative deed (Exhibits 5 & 6)(R 40, 41) entered in the liability trial (RB 4, 5, 6) which certified title to all described in sale agreement of December 2nd, 1958.

(5) The Court was wrong to allow the Attorney Defendant to ignore and deny the opinion and order of the Court (RB 19, 20) and over objection of counsel to retry his liability in the damage part of the action before the jury causing an extended damage trial (RB 18)(RB 6 thru 13)(RB 15 thru 25).

(6) The Court was wrong to argue as was done in this case and in effect saying that no-one should rely on his lawyer or have a right to so rely (R 104, 105)(RRB 4) and it could be assumed that from the above the Court would also misconceive the special issue of the argument for costs in which Plaintiffs maintained that an Attorney must be held to a higher standard than an ordinary litigant in the Courts of the land and this case could not be compared to the average personal injury case as was suggested by the Court (R 178)(RB 29, 30, 31)(RRB 4).

(7) After special jury verdict (R 3) of the date of March 1964 and award of $18,000 the Court asked Plaintiffs to waive interest (R 134) pointing out that if Plaintiffs did

not waive interest the Court would require procedures which would entail expenditures substantially more than the amount of interest involved. This had been the tenor of the entire case to make it so expensive that the Plaintiffs would give up.

(8) When the Court awarded damages of only $600 (R 3) of a ligitimate $5,874 listed in Plaintiffs' Brief (R 149 thru 151) and only $99.10 of interest awarded in exercise of the Court's equitable discretion, it must be conceded from the above that the Court would not in exercise of its equitable discretion award additional costs as sought by Plaintiffs (R 154 thru 157) (RB 32).

(9) The Court was wrong to state that the initial damages claimed in Plaintiffs pre-trial memorandum (R 14, 15) shows in an area of $70,000 to $80,000 (R 180, 181). This misstatement of fact is covered in Plaintiffs Reply Brief page 7, also Plaintiffs Brief pages 2 & 3, which shows that Plaintiffs pre-trial memorandum under no.5 states, "The proper measure of damages -- is the DIFFERENCE between the expenses incurred by the Plaintiffs in purchasing and improving the land -- and the fair market value today of the property they hold", and under no.7 of Plaintiffs pre-trial memorandum it states, "In the alternative and without regard to defects in title (which was the case in the damage part of the action) the Plaintiffs submit the damages claimed in affadavit in support of jurisdictional amount ($17,950) executed by Velma S. Palmer on March 7th, 1965" (R 8, 9, 10).

The statement by the Court that, "The Defendant was entitled to contest that amount of damages ($70,000 to $80,000) and it was contested both through the pre-trial proceedings, and through settlement discussions which were had, and at the damage hearing", are also mis-statements of fact (R 181). The Plaintiffs made an offer of settlement at the September 26th, 1966 pre-trial conference preceding the jury trial on damages. At the request of the Court (RB 7)(R 69):

> the Plaintiffs offered a settlement of $25,000 difference in value for the loss of the land. The Defendant offered a settlement of $5,000 to clear up the whole thing (R 70). The jury verdict of $18,000 for the difference in value for the land lost (R 3 (2)) shows conclusively that the Defendant was unreasonable and unrealistic.

The highest amount in damages set before the jury by Plaintiffs' expert was $25,000. The highest amount in damages set before the jury be Defendant's expert was $5,000 as evidenced by the Court's charge to the jury (R 133) so that there never was an amount of $70,000 or $80,000 before the jury, or in the settlement discussions, or in the initial damages claimed by Plaintiffs in their pre-trial memorandum dated September 13th, 1965 (RB 2 & 3), and all set forth on page 7 of Plaintiffs Reply Brief, also Plaintiffs Brief page 29.

On these mis-statements of fact the Court suggested (R 181) that, "Mr. Nissen cannot be charged with bad faith or dilatory tactics or vexatious litigation or breach of any conduct as

an Attorney by the act of defending this law suit in which liability was reasonably disputed and certainly the amount of damages claimed by the Plaintiffs was reasonably disputed". The amount of money involved is irrelevant to the argument for additional costs in this case because the evidence and jury verdict compels the conclusion that the amount of damages asked throughout by Plaintiffs was fair and justified and the Attorney Defendant's conduct in defending this law suit as to liability as well as damages was unfounded and unreasonable (RB 1 thru 32)(RRB 1 thru 8).

Through the unfounded defenses carried vexatiously, wantonly and in bad faith this case has not only cost almost double the amount of the jury award but has taken an extraordinary amount of Plaintiffs' time and effort to conclude this litigation. In this case the Plaintiffs had two choices, one was to accept the loss and do nothing conceding that there is no justice for a client who has been injured by his Attorney, the second is to retain counsel, if one can be found, and seek legal redress. Under the second alternative the chances are substantial that the cost of litigation particularly legal expenses and expert witness fees will exceed the claim for damages. Neither of these alternatives is satisfactory for a well ordered legal system or a well regulated legal profession. If these are the only choices open to a person injured by Attorneys, then it is clear, the legal professions and the Courts of this country, of which Attorneys are officers, are failing to meet their obligations to the public.

This case and argument for costs involves the integrity and ethics of the legal profession and in the conclusion of Plaintiffs Brief (RB 29, 30, 31) it is pointed out that there is no-one to police the legal profession but the profession itself. It is submitted

only that if an Attorney Defendant undertakes his defenses in a manner as was done in this case and if the ultimate substantive determination of the action results in a clear refutation of his defenses, then simple justice and the integrity of the legal profession require that the Attorney Defendant defray all of Palintiffs' expenses in obtaining justice.

Therefore we respectfully urge that the United States Supreme Court, as a Court of last resort, grant the petition for a writ of Certiorari and review this case at no further cost or effort to the Appellant. The Appellant in this case has been in Europe on personal matters since September 12th, 1967 and will not return until May 1st 1968 and it is urgently requested that this case not be turned down through failure to meet printing or other technical requirements.

CONCLUSION

(1) The facts and evidence in Appellant's Brief, Reply Brief with Appendix compel the conclusion that the Attorney Defendant under 6 Moore Federal Practice Paragraph 54.77 (2) at 1352 did maintain unfounded defences, vexatiously, wantonly, and in bad faith.

(2) The facts and evidence in Appellant's Brief, Reply Brief with Appendix compel the conclusion that the Federal District Court did not accord the Appellant equitable treatment, or equitable discretion, and the unethical and inequitable treatment accorded the Appellant by the Court compels the conclusion that the Federal District Court was unable to use equitable discretion in the decision on costs, particularly Attorneys fees and expert witness fees as sought (R 154 thru 157) to the detriment of the Plaintiffs.

(3) The facts and evidence compel the conclusion that the Federal District Court was wrong and unjustified in denying the Plaintiffs' claim for additional costs as sought (R 154 thru 157).

(4) The facts and evidence compel the conlcusion that therefore the First Circuit Court of Appeals was wrong and unjustified to affirm the decision of the Federal District Court.

(5) The facts and evidence compel the conclusion that when an Attorney Defendant undertakes his defenses in a manner as was done in this case, this case is lifted out of the ordinary.

We therefore respectfully urge for reasons herein set forth that Plaintiffs' appeal, from the order by the First Circuit Court of Appeals affirming the denial of the Federal District Court for additional costs, be reversed and the United States Supreme Court in awarding a decision favourable to Appellant will exert a profound influence on the legal profession and will be justified as having been made for dominating reasons of justice.

Respectfully submitted

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Pro-se

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Certificate of Serivee

This is to certify that a copy hereof was this day mailed to William B. Mahoney Esq. and Lawrence P. Mahoney Esq., 120 Exchange Street, Portland Maine with posage certified and prepaid

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In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. 1126

VELMA S. PALMER,
PLAINTIFF, PETITIONER,

v.

ARTHUR E. NISSEN,
DEFENDANT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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In the
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No. 1126

VELMA S. PALMER,
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ARTHUR E. NISSEN,
DEFENDANT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent's Objections To Issuance of Writ

The Respondent, Arthur E. Nissen, appears in opposition to the petition of Velma S. Palmer, Petitioner, for a writ of certiorari filed in this Court on February 16, 1968,

seeking review of a judgment entered on September 25, 1967 in the Court of Appeals for the First Circuit.

The Respondent, Arthur E. Nissen, respectfully urges that this Court deny said petition because:

1. The judgment sought to be reviewed is a judgment affirming on appeal (per curiam) a judgment for costs only, entered in the United States District Court for the District of Maine (Southern Division) wherein the Court in the exercise of its conceded inherent equitable jurisdiction and power denied an award of additional costs prayed for by the Petitioner, (Plaintiff), where in the petition there is not set forth any sustainable claim of error in the Court of Appeals in the finding, i.e. that the Petitioner had not met the burden "to show that the Court was necessarily wrong and unjustified and that the evidence compelled a conclusion favorable to her."

2. The Supreme Court of the United States is without jurisdiction to issue the writ of certiorari to said Court of Appeals, prayed for in this petition, which was filed in this Court on February 16, 1968, seeking review of a judgment entered in said Court of Appeals on September 25, 1967 because said writ was not applied for within ninety (90) days after entry of such judgment, as is provided for in 28 USCA Sec. 2101(c) and because the time for applying for said writ had not been extended by a Justice of this Court as provided in said Sec. 2101(c).

3. This petition to the Supreme Court of the United States for a writ of certiorari to review a judgment in the Court of Appeals, affirming judgment for costs only entered in the District Court, which denied in the exercise of conceded inherent discretion and power, additional costs claimed by the Plaintiff is not allowable as a matter of law.

Statement of the Case

(In this brief, page references to Plaintiff's Record Appendix will be R. ., and the Defendant's Record Appendix will be D. R. .)

This was a diversity action originally brought by Stephen S. Palmer and Velma S. Palmer, as Plaintiffs, against Arthur E. Nissen, an attorney engaged in the practice of law in Maine, as Defendant, to recover money damages of an unspecified amount, interest and costs, (R. 8), claimed to have been sustained by the Plaintiffs by reason of services performed by the Defendant for the Plaintiffs "in a careless, negligent and unskillful manner and without that degree of , diligence and skill required of him as an attorney", (R. 6-7).

The issues as developed at initial pretrial conferences were whether (1) there were title defects in the property conveyed (2) the area conveyed by the deed was less than that provided in the purchase and sale agreement, R. 10 and 11.

Trial by the Court without a jury on the issues of liability (R. 29) resulted in a finding in favor of the Defendant on the issue of claimed title defects P. 55 and in the entry of a judgment by stipulation in favor of the Plaintiff upon a factual finding by the Court that the deed conveyed less land than that described in the sales agreement R. Page 64.

The Court found that the Plaintiffs "do not suggest that the Defendant acted fraudulently or in bad faith", (R. 54, Note 11).

Jury trial on the issue of damages resulted in a special verdict for the Plaintiff for $18,000.00 (R. 153) and an allowance by the Court of $600.00 as additional damages for legal, appraisal, survey and other expenses incurred by the Plaintiff.

Judgment entered in the amount of $18,600.00 with interest of $99.10 on December 30, 1966 was satisfied by the Defendant without prejudice to the right of the Plaintiff "to seek costs as provided by law." (D. R. 193).

The Plaintiff filed with the Clerk a bill of costs aggregating $13,565.22 (R. 156-157).

A taxation of costs by the Clerk allowed $460.13 (P. 166). On Plaintiff's Motion to Review of Clerks taxation of costs (R. 171-185), the Court entered an order on April 21, 1967 affirming the taxation of costs by the Clerk. The Court in the specific exercise of conceded inherent equitable discretion and power denied the Plaintiff's request for additional costs.

Appeal to the Court of Appeals was argued on September 11, 1967.

On September 25, 1967 the judgment sought to be reviewed was entered in that Court. Memorandum and order dated September 25, 1967 was filed in the District Court on October 11, 1967.

Argument

I. The Petition Should Be Denied

At outset we will, from the record, endeavor to place in their proper perspective, the claims of the Plaintiff that the defenses to the suit were unfounded, in bad faith, and were conducted in vexatious and wanton manner.

Such claims are the product of a very vivid imagination.

The material facts are:

1. After the Court had denied the Defendant's motion under Rule 12(e) FRCP for a more definite statement of the specific grounds upon which Plaintiff's action was predicated, the Defendant was informed at the initial pretrial conference (R. 13) of the specific grounds upon which the

alleged defects in the title were claimed to be defects. He thereupon furnished to the attorneys for the Plaintiff in recordable form, prior to the trial on the issues of liability, the documents listed in Note 12 (R. 55) which were, in fact, recorded by the local attorney for the Plaintiff in the Lincoln County Registry of Deeds. The Court ruled that said documents so furnished, corrected title defects, if any, in fact existed.

There certainly is nothing in that activity which possibly could be construed as wanton, vexatious or unfounded.

2. On the Plaintiff's claim that the deed, Plaintiff's Exhibit 2, (R. 36) conveyed less area than was described in the purchase and sale agreement, Plaintiff's Exhibit 2 (R. 33). The position taken in defense by the Defendant was that described property in the deed conveyed not only the entire area of the property described in the purchase and sale agreement but in addition thereto, conveyed riparian rights on adjoining property (R. 38) (line 2 starting with the word "Also" to the end of the paragraph). At the trial on the liability issue, the Defendant in open court stipulated that if the Court should find as a fact that less land was conveyed in the deed then without more, the Court was authorized to enter judgment for the Plaintiff and against the Defendant. See Note 4 (R. 49) which was the specific basis upon which the judgment was entered (R. 64) (second sentence in the first paragraph).

No reasonable claim could be advanced that the making of the aforesaid stipulation, was a wanton or vexatious activity, on the part of the Defendant.

The claim of the Plaintiff was that the discovery procedure was abused by the activity of the Defendant in taking four discovery depositions. The fact is, that each of the depositions following the first was taken under the specific direction of the Court and the necessity therefor, is

clearly shown by the statement of the Court at the top of the page (R. 176).

It is a significant fact that the Plaintiff was not called as a witness by her then counsel in either the hearing on liability or damages.

Her tirades against the Judge of the District Court, the Defendant and his counsel throughout the petition for certiorari should be treated as the obvious rantings of a belligerent litigant who did not see fit to offer herself as a witness in her own behalf, to testify under oath and subject herself to cross examination in the hearing before the Court on the liability issue or before the jury at the trial on the damage issue.

The pursuit of the claim for additional costs followed a similar pattern. The affidavit in the verified bill of cost was not made by the Plaintiff, who was present, but by her then attorney, who in his memorandum disclaimed personal knowledge as to the particular circumstances of the case, because they arose largely before he entered the case. (R. 154). The Plaintiff was not offered as a witness to support the ground upon which she based her claim for additional costs before the Clerk. Through her then counsel she simply filed a waiver of hearing before the Clerk and while she was present at the hearing before the Court on the Motion to Review the taxation of costs case, she did not testify (R. 171-188).

Incidentally, the Plaintiff precluded the writer of this brief, who handled the defense for the Defendant in the liability hearing, from participating before the jury in the damage hearing by naming him as a witness to be called by her (Pretrial Brief R. 152, eighth name listed) and then not calling him.

The bold broad statements of conclusions set forth in the second paragraph on Page 2 of the petition, or the final conclusion that the First Circuit Court of Appeals was

wrong and unjustified to affirm the decision of the Federal District, set forth in said second paragraph, cannot be held to control over the specific factual findings, hereinafter set forth, which demonstrate the meticulous care with which the Court considered the claims of the Plaintiff in support of her motion for an award of additional costs.

Digest of Factual Findings

1. That an examination of the depositions, will show that counsel, "just could not get answers to questions which were asked of the Plaintiff", (R. 176).
2. The Defendant was not responsible for the breach of relationship between the Palmers and their attorneys, (R. 176-177).
3. The expenses claimed by the Palmers were not in any way justified by the requirements of the litigation, (R. 177).
4. The finding of the court of breach of duty of due care was certainly not a finding of any intentional dereliction malfeasance, or wilful act on the part of the defendant, (R. 179).
5. The legal question involved and the interpretation of the sales agreement as against the deed was not an easy one and it certainly could be argued both ways, (R. 180).
6. There was both a substantial legal argument on liability, substantial factual argument on liability which the defendant was presenting throughout these proceedings, (R. 180).
7. The damage question was properly contested, (R. 181).
8. The Defendant cannot be charged with bad faith or dilatory tactics or vexatious litigation or breach of any conduct as an attorney by the act of defending this law suit in which liability was reasonably disputed (R. 181).

9. The Defendant prevailed on one of the liability issues and lost on the other liability issue and on the damages, the jury came in in between the positions of the two parties, (R. 181).

The factual finding on R. 186-188, inclusive, establishes a firm foundation for the exercise of the Courts conceded inherent equitable discretion and power in entering the order denying the Plaintiff's request for additional costs.

Law

Objections 1 & 3

(In the Interest of Brevity Objections 1 & 3 are to be argued together.)

It is plainly apparent that the sole question presented to this Court on this petition is whether the Plaintiff may be granted a review, by way of certiorari, of a judgment entered in the Court of Appeals, which affirmed a judgment for costs alone entered in the District Court in which the District Court denied in the exercise of its conceded inherent equitable discretion and power a request by the Plaintiff for an award of additional cost for counsel fees and other costs.

It is settled law that such a review is not allowable, either in this Court or in the Court of Appeals, whether the petition be construed as a petition for certiorari as indicated on Page 1, thereof, or as an appeal as indicated on Page 10.

Newton v. *Consolidated Gas Company of New York*, 265 U.S. 78 at 83, 44 S.Ct. Rep. 481 at 483—1924.

"The rule forbidding appeals from decrees for costs only is easily deducible from the discretion vested in

the trial court in fixing them and the better opportunity of that court to exercise that discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case. When the *power* of the court to assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed. But the rule is not absolute, and should not be enforced when the trial court *assumes the power to assess* as costs against a fund or a party, expenditures of a class not legally assessable as such. Where a question of this kind is made, appeals have been allowed. (emphasis supplied)

Canter v. *American Insurance Company,* 1830 (NY) 3 Peters 307 — 28 L. ED. 688

No appeal lies from a mere decree respecting costs and expenses.

Glendale Elastic Fabrics Company v. *Smith,* (Mass.) 1879, 100 U.S. 110, 25 L. ED. 547

No appeal lies from a decree respecting costs and expenses.

Walker v. *Lee,* 71 Fed. 2 622 (CCA Cal.)

Order Taxing Costs is non-appealable if matter at issue is within judge's discretion.

West v. *East Coast Cedar Company,* (1902) 113 Fed. 742 — 101 Fed. 727

The awarding of costs in equity is discretionary with the court and no appeal lies from its action in the matter.

Lyons v. *Empire Fuel Company,* 1921, 257 Fed.2 890 (1939)

The only time that an order made after judgment denying Motion of the Plaintiff for allowance of costs or expenses is reviewable is when the order is based on want of power in the court to make the allowance.

See also:

U. S. v. *Knowles Est.* (1932), 58 Fed. 2 718
U. S. v. *Ward* (1923), 58 Fed. 2 1086

We have found no case where the Supreme Court or any Court of Appeals has ever granted an appellate review of such a judgment.

The Court of Appeals was right in ruling that under the "American Rule" each party concerned bears his own counsel fees.

Fleischman Distilling Co. v. *Maier Brewing Company,* Decided May 8, 1967. Reported in advance sheet No. 15, June 1, 1967 — 87 S.Ct. Reporter 1404.

Commencing at page 1406 (2), the court reviews and lists the pertinent Supreme Court cases developing and supporting the American Rule and the limited exceptions to that Rule.

On appeal the appellant has the burden of showing that the evidence before the court below, compelled a finding in his favor.

Barron & Holtzoff, Vol. 2B, Ch. 10, Sec. 1131, Page 514 and cases cited in Note 11.

The Court of Appeals was right in finding that this burden was not met. (Digest of factual findings, Page 7)

Allowance of counsel fees as additional costs may be made only in exceptional cases and for dominant reasons of justice and must be based on factual findings in the District Court of bad faith or fraud.

Niday v. *Graef* 279 Fed. 941
Gordon v. *Woods* 202 Fed. 2 476(1)
Bush v. *Remington Rand* 213 Fed. 2 456-466
Barron & Holtzoff (Wright Edition, Ch. 11 Par. 1197 Note 35, Pages 66 and 67)

Decision on this question is the duty and responsibility of the District Judge who entered the final judgment.

Farmer v. *Arabian American Oil Company,* 379 U.S. 227 at 233 85 S.Ct. Rep. 411 at 415

It is clear that the factual finding heretofore digested precluded any allowance of counsel fees. (Page 7 *supra*)

OBJECTION No. 2

Whether the judgment for costs entered on September 25, 1967 in the Court of Appeals be considered as a final judgment on that date or on the date of receipt of the Mandate to the District Court on October 11, 1967, this petition applying for the writ of certiorari entered in this Court on February 16, 1968 was not entered within ninety (90) days of the date of final judgment in the Court of Appeals and hence, this Court has not acquired jurisdiction to issue the writ of certiorari, so requested.

Toledo Scale Co. v. *Computing Scale Co.*, 1923 261 U.S. 399 43 S.Ct. 458
Bonin v. *Gulf Co.*, 1904 198 U.S. 115 25 S.Ct. 608
United States v. *Lippman, Spier & Holm*, 1922 260 U.S. 717 43 S.Ct. 95; 1922 260 U.S. 742 43 S.Ct. 163
Federal Trade Commission v. *Minneapolis, Honeywell Regulator Co.*, 1952 344 U.S. 206 73 S.Ct. 245
32 Am. Jur. 2nd Sec. 282 Page 747.

Conclusion

The Defendant, Respondent therefore urges that for the reasons herein set forth, the Plaintiff, Petitioner's request for issuance of a Writ of Certiorari to the Court of Appeals for the First Circuit be denied.

Respectfully submitted,

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